Supreme Court, U.S.
FILED
MAY 29 1998
CLERK

No. 97-1764

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

SCHOOL DISTRICT RESPONDENTS' BRIEF IN OPPOSITION

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May 29, 1998

QUESTIONS PRESENTED

1. Whether a motion to amend an Establishment Clause claim is properly deemed futile when the proposed claim that a choir teacher chose songs and performance venues for the purpose of promoting religion is supported solely by an inference of an unexpressed motivation to promote religion based on the teacher's alleged past conduct and religious character.

2. In considering a motion to amend a complaint, whether proposed allegations may properly be disregarded as speculative, conclusory, or unsupported by the record evidence proffered in support of the allegations.

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SCHOOL DISTRICT RESPONDENTS' BRIEF IN OPPOSITION

Respondents Salt Lake City School District, William Boston, Gene Bonella, Teresa Piele, Dolores Riley, Darline Robles, Dale Manning, and Mary Jo Rasmussen (the "School District") respectfully request this Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

STATEMENT OF THE CASE

As a sophomore at West High School in Salt Lake City during the 1994-95 school year, Rachel Bauchman attended an a capella choir class taught by Richard Torgerson. At the end of the school year, Bauchman brought this suit against Torgerson and the School District. Bauchman alleged that Torgerson had violated the Establishment Clause by including songs containing religious lyrics in the choir class curriculum and by holding some choir performances at churches and church-owned venues. Although Bauchman initially sought injunctive and declaratory relief in addition to damages, all but her damages claim became moot when Bauchman graduated from high school one year ago.

In motions to dismiss the complaint, Torgerson and the School District contended: (1) that Bauchman had failed to state a valid Establishment Clause claim because both the songs and the venues served clearly secular educational purposes, particularly given the predominance of religious songs in choral music and the suitability of churches for public choral performances; (2) the individual defendants were entitled to qualified immunity from Bauchman's damages claim because no clearly established law existed to alert them that the alleged conduct violated the Establishment Clause; and (3) Bauchman had failed to allege sufficient facts to establish supervisory liability against the School District.

Although Bauchman responded to the motions to dismiss and filed a supplemental pleading concerning the high school's graduation exercises while the motions were pending, she elected not to amend her complaint to include any allegation that Torgerson selected songs and performance

venues with the purpose or intent of advancing religion. The district court dismissed Bauchman's complaint on all three grounds raised in the motions.

After the district court had entered its final judgment of dismissal, Bauchman finally moved, through a motion to amend the judgment, for leave to file a proposed amended complaint. Unlike the original complaint, the proposed amended complaint alleged for the first time that Torgerson had selected the songs and venues for the purpose of promoting religion.

Although it considered Bauchman's motion to amend untimely given her opportunity to amend before the dismissal of her complaint, the district court withheld ruling on the motion to amend while the parties conducted extensive discovery on Torgerson's allegedly religious purpose in selecting the songs and venues. The district court limited discovery to conduct and events occurring during the 1994-95 school year when Bauchman was a choir member, unless Bauchman could show a "clear and concise nexus" between Torgerson's alleged past conduct and Bauchman's alleged injury in 1994-95.

Following discovery, Bauchman filed a renewed motion to amend. Rather than revising her proposed amended complaint, Bauchman proffered affidavits, deposition testimony, and other evidence in support of her renewed motion. The thrust of the proffered allegations and evidence was that before the 1994-95 school year, Torgerson had engaged in conduct beyond the mere selection of songs and venues, such as having the choir perform at religious worship services, for the purpose of advancing religion. Considering the allegations of the proposed amended complaint as supported by

the record evidence, the district court denied Bauchman leave to amend, reasoning that: (1) the proposed amendment was untimely, A106-107; and (2) the proposed amendment would be futile because under the objective reasonable observer standard established by the endorsement test for Establishment Clause violations, Torgerson's subjective intent in selecting the songs and venues during the 1994-95 school year was irrelevant. A86-87.

The court of appeals affirmed the district court's decision that the motion to amend was futile based on three grounds: (1) the presence of a religious purpose alone does not satisfy the "actual" purpose component of the endorsement test, and Bauchman never alleged the lack of any clearly secular purpose as required; (2) Bauchman's standing is limited to any infringement of her rights while she was a choir member and a plaintiff may not bootstrap her constitutional claims based on alleged past violations suffered by nonparties; and (3) the "actual" purpose component of the endorsement test must be satisfied by "objectively discernible conduct or communication that is temporally connected to the challenged activity and manifests a subjective intent to favor religion or a particular religious belief." A38-40.

In affirming the district court's judgment, the court of appeals did not reach the issues of: (1) whether the district court properly denied leave to amend because the motion was untimely, (2) whether the individual defendants were qualifiedly immune from Bauchman's damages claims, or (3) whether Bauchman failed to allege sufficient facts to establish supervisory liability against the School District.

REASONS TO DENY THE PETITION

I

THE ISSUES PRESENTED ARISE IN A CONVOLUTED SUBSTANTIVE AND PROCEDURAL CONTEXT IN A CASE THAT IS LARGELY MOOT

The issues presented arise within a convoluted substantive and procedural posture that counsels against their consideration by this Court. The procedural context weighs against such consideration because the issues presented involve only proposed allegations that were never placed directly in issue below. Furthermore, the issues presented have little, if any, practical significance because Bauchman's claims are largely moot and several alternative grounds exist for dismissal of her remaining claim in damages. The substantive context of the questions presented also supports denial of the Petition because the decision below rested on two independent grounds not encompassed by the issues presented, and because Bauchman has misconstrued both the breadth and basis of the Tenth Circuit's decision.

Bauchman's allegations concerning the choir teacher's purpose in selecting songs and venues, which are the focus of the issues presented, were never placed directly in issue below. Rather, those allegations were presented only in the context of Bauchman's motion to amend the complaint. Contrary to Bauchman's incorrect assertion that this case was decided at the "pleading stage," the motion to amend was filed only after the district court had already entered a final judgment dismissing Bauchman's entire complaint. Moreover, in addition to ruling

that Bauchman's proposed amended complaint was futile, the district court rejected Bauchman's motion as untimely.

Accordingly, contrary to Bauchman's contention that this case presents the question of the standard of proof of a religious purpose "in as clear a fashion as possible," it is difficult to imagine a more convoluted procedural posture for review of the issues presented. Rather than reviewing a clear and well-defined legal question under a de novo standard of review, the Tenth Circuit reviewed the district court's decision under an abuse of discretion standard. The same abuse of discretion standard would apply to the questions presented on certiorari review.

In addition to arising in the context of an abuse of discretion review, the questions presented have little practical significance, if any. As the Tenth Circuit determined, Bauchman's claims for injunctive and declaratory relief are moot because Bauchman graduated from high school one year ago. That determination of mootness is not fairly subsumed by either of the questions presented by the Petition and is therefore conclusive.

Bauchman's proposed claim in damages also lacks practical significance because it would be subject to dismissal on several alternative grounds not raised by the Petition. In addition to determining that her motion to amend was untimely, the district court also held that (1) the individual defendants were immune from Bauchman's proposed damages claims under the doctrine of qualified immunity, and that (2) Bauchman's allegations were insufficient to establish supervisory liability against the School District. All of these

alternative grounds were argued to the Tenth Circuit and therefore remain at issue in the case.

The substantive context of the questions presented also supports denial of the Petition. Although the Tenth Circuit articulated three independent grounds for its ruling that Bauchman's allegations concerning the choir teacher's past conduct were irrelevant under the purpose prong of the Establishment Clause test, the Petition addresses only the third stated ground. In addressing the relevance of Bauchman's proposed new allegations, the Tenth Circuit stated:

> Ms. Bauchman's allegations regarding Mr. Torgerson's past conduct are irrelevant to her Establishment Clause claim *for three reasons*. First, as previously discussed, the "actual" purpose component of the endorsement analysis begins by asking whether there is a lack of a clearly secular purpose, not whether there is any religious purpose present . . . . As previously discussed, *Ms. Bauchman never alleged the defendants lacked a secular purpose*.

A38 (emphasis added). Second, the Tenth Circuit ruled that

> [Ms. Bauchman's] standing to sue . . . is limited to claims related to the infringement of her own constitutional rights while she was a Choir member. Accordingly, the allegations and evidence relevant to Ms. Bauchman's claims are limited to defendants' conduct and events during the 1994-95 school year. *The district court did*

not abuse its discretion by so limiting discovery and its analysis of Ms. Bauchman's claims.

A38-39 (emphasis added). Only then did the Tenth Circuit turn to the reasoning challenged by the Petition, holding that allegations of unexpressed psychological motives inferred from alleged past conduct are insufficient to show a religious purpose. A39-40.

Moreover, in attacking the Tenth Circuit's third rationale, Bauchman has overstated the breadth of the court's holding. First, in suggesting that the court went so far as to exclude all "circumstantial and historical evidence" and to require an "express and contemporaneous admission" of a religious purpose, Bauchman inflates the court's actual requirement of "objectively discernible conduct or communication that is temporally connected to the challenged activity." A39.

Second, nothing in the Tenth Circuit's opinion suggests that it may properly be read without regard to the facts of this particular case, as Bauchman suggests. To the contrary, the court's ruling that Bauchman's allegations were irrelevant may legitimately be interpreted *only* in light of the specific alleged facts. None of those alleged facts was necessarily inconsistent with a primarily secular motivation for the choir teacher's selection of songs and venues. Other than the selection of songs and venues, none of the alleged conduct extended into the 1994-95 school year. Just as tellingly, none post-dated the School District's April 1994 directive advising the choir teacher that "you, as a faculty member at West High, cannot initiate or encourage religious exercises of any kind while representing the school" and that "you cannot arrange for or encourage students

to participate in religious exercises of any kind while representing the school." TCA 811. Nor did any post-date the choir teacher's public apology and pledge "that I [will] never again as an agent of the school offer a prayer in the [students'] presence or involve them in a worship service of any kind." TCA 582-83.

Indeed, most of the alleged conduct pre-dated this Court's watershed Establishment Clause decision in *Lee v. Weisman*, 505 U.S. 577 (1992), and the enactment in 1993 of Utah's Recognizing Constitutional Freedoms in the Schools Act, which expressly prohibits the promotion of religion in the public schools, including school choir performances as part of a religious worship service. *See* Utah Code Ann. § 53A-13-101(6) and -101.1 (1993); Utah Admin. Code R277-105-7C(1).

Thus, in requiring "objectively discernible conduct or communication that is temporally connected" to the challenged conduct, the Tenth Circuit recognized that Bauchman's allegations lacked any probative value to show that the choir teacher's primary motivation for the challenged conduct was not secular.[1]

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[1]Bauchman further misconstrues the Tenth Circuit's decision in suggesting that the court inappropriately weighed the evidence or determined "not to believe" her allegations. To the contrary, the court obviously rejected many of Bauchman's characterizations of the record as inaccurate, as did the district court. *See* A89 ("Some of [Bauchman's] claims are speculative or conclusory; others are unsupported or at odds with an objective review of evidence developed in discovery."). Bauchman continues to overstate the record in the Petition. For example, Bauchman's assertion that

II

THE DECISION BELOW PRESENTS NO DIRECT OR INDIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

The four circuit court decisions cited by Bauchman as conflicting with the Tenth Circuit decision in this case are readily harmonized with the Tenth Circuit decision. Unlike this case, none of the purportedly conflicting decisions presented an Establishment Clause issue in a procedural context that invoked an abuse of discretion standard of review. The Third, Fifth and Eleventh Circuit decisions are also inapposite because they all addressed the explicitly religious exercise of prayer. Rather than conflicting with the decision below, the Eighth Circuit case was relied upon by both the district court and the Tenth Circuit to *support* their rulings that including songs with religious lyrics in a choir class curriculum and holding some choir performances at churches and church-owned venues comports with the Establishment Clause.

Torgerson "used class time and public school facilities" to organize a trip in 1994-95 finds no record support. TAC 735A. Similarly, her allegation that the "three Jewish students in the class, including Rachel, were not invited to participate" in the tour is directly contravened by the testimony of one of the Jewish students that she had been contacted about the tour but had chosen not to go. District's Supplemental Appendix 161, Tenth Circuit No. 96-4101. Furthermore, the Tenth Circuit correctly rejected Bauchman's argument that the district court improperly granted summary judgment against her as "without merit" and "disingenuous." A42.

The Third, Fifth and Eleventh Circuit decisions all addressed state statutes or school board policies permitting prayer at school functions. *See American Civil Liberties Union v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (invalidating school board policy allowing graduation prayer upon vote of students); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (invalidating statutory provision allowing student-requested prayer at all school functions, but upholding provision allowing graduation prayer based on student vote); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 826 (11th Cir. 1989) (invalidating school board policy permitting invocations before football games).

Unlike Bauchman's proposed claim, none of these allegedly conflicting decisions rested solely on the purpose prong of the Establishment Clause test. Moreover, the explicitly religious nature of the challenged conduct largely obviated the need to consider any indirect or circumstantial evidence of subjective intent. To the extent that these decisions relied upon such evidence, the evidence merely buttressed the already strong showing of a religious purpose based on inherent nature of the challenged conduct.

Thus, in *Black Horse*, the Third Circuit focused upon the fact that the school board's "avowed purpose" (not its unexpressed psychological motivation as revealed by past conduct) was to preserve the longstanding tradition of prayer, that "[p]rayer is, of course, religious speech," and that the policy permitted students to give a "sectarian, proselytizing address." *See* 84 F.3d at 1480, 1484. The court also rejected the school district's claimed purpose of advancing free speech, noting the school's continuing control over the graduation forum. *Id.* at 1484.

Similarly, in *Ingebretsen*, the Fifth Circuit's conclusion that a state statute allowing "student-initiated" prayer at school functions violated the purpose prong was based primarily on the statute itself. The court reasoned that the legislature's declared purpose of advancing free speech "cannot be characterized as secular" because the "clear intent" of the statute was "to inform students, teachers, and school administrators that they can pray at any school event so long as a student 'initiates' the prayer," 88 F.3d at 279. The court noted that the statute allowed school officials to lead students in prayer and "set[] aside special time for prayer that it did not set aside for anything else." *Id.* at 280.

The court further relied on the legislature's "resolution commending [the principal] for his unswerving dedication to prayer in the public schools," *id.* at 279, and the public "uproar" over the treatment of the principal that directly prompted the enactment of the challenged statute, *id.* at 277, 279, to reach the "unavoidable" conclusion that the statute was intended to promote religion. *Id.* at 279.

In the same vein, in *Jager*, the Eleventh Circuit noted that the school board had chosen "religious invocations, which by definition serve religious purposes," although the asserted secular purposes of solemnizing football games and instilling values of fair play could be equally served by "wholly secular inspirational speeches." 84 F.3d at 1484. Furthermore, the court concluded that "an intrinsically religious practice, *cannot* meet the secular purpose prong of the Lemon test . . . ." *Id.* at 830 (emphasis added).

Bauchman inaccurately asserts that the school officials in *Jager* "insist[ed] that their actions were 'wholly secular from start to finish.'" Petition at 16 (citing 862 F.2d at 829 n.11). As

an examination of note 11 demonstrates, the phrase "wholly secular" refers to the "football program," and is immediately preceded by an admission that the invocations, "have no secular purpose whatsoever." *See* 862 F.2d at 829 n.11. Contrary to Bauchman's conclusion that the court made no reference to express, contemporaneous statements evincing a religious purpose, the court found that the admission "reinforces our conclusion that the actual purpose behind both the equal access plan and the prior invocation practice was to endorse Protestant Christianity." *Id.* at 829-30 n.11.

Indeed, the Tenth Circuit also noted the obvious analytical distinction that Bauchman ignores between intrinsically religious activity such as prayer and the selection of religious songs and performance venues in the context of a choir class--conduct that is entirely consistent with a primarily secular educational purpose:

> Although the [Supreme] Court has indicated a failure to satisfy the purpose component of the endorsement test alone is sufficient to invalidate government action, the Court rarely has decided cases based solely on the purpose component. When it has, *the overriding religious purpose of the government action has been obvious, leaving little need to elaborate on the appropriate scope of the purpose inquiry.*

A20 (emphasis added).

Nor can the Eighth Circuit's reasoning in *Florey v. Sioux Falls School District*, 629 F.2d 1311 (8th Cir. 1980), be stretched to even tangentially conflict with the Tenth Circuit's

decision in this case. Given its decision upholding the school board's policy of permitting observance of holidays having both a religious and secular basis, the court's statement that "religious ceremonies can [not] be performed under the guise of 'study'" may not reasonably be interpreted as suggesting a need to examine remote and indirect evidence of intent to determine the actual religious purpose behind such study. To the contrary, as in the case of prayer, the religious purpose behind such a ceremony would be obvious.

III

CRAWFORD-EL DOES NOT UNDERMINE THE DECISION BELOW, WHICH IS BASED UPON POLICY CONSIDERATIONS UNIQUE TO ESTABLISHMENT CLAUSE CLAIMS

This Court's narrow 5-4 decision in *Crawford-El* provides no basis for granting the Petition or remanding this case for reconsideration by the Tenth Circuit because *Crawford-El* examined policy considerations entirely distinct from those involved in this case. *See Crawford-El v. Britton*, No. 96-827, 1998 WL 213193 (US May 4, 1998). In *Crawford-El*, the D.C. circuit had fashioned a broad rule requiring clear and convincing evidence to support *all* motive-based constitutional torts. The proposed rule was grounded in the policies behind the doctrine of qualified immunity, its sole purpose being to encourage early disposition of insubstantial claims. This Court found no support for the rule in the text of § 1983, any other federal statute, or the Federal Rules of Civil Procedure.

Unlike *Crawford-El*, the Tenth Circuit's decision in this case is based solely on policy considerations unique to Establishment Clause claims and not on any desire to encourage early disposition of such claims. In addition, unlike the broad, clear and convincing evidence rule rejected in *Crawford-El*, the Tenth Circuit's requirement of objectively discernible and temporally connected evidence of religious purpose is limited by both the procedural posture and the specific factual allegations of this case, as discussed in Point I above. Finally, the Tenth Circuit's decision is clearly inapplicable to motive-based torts founded on other constitutional provisions, and even to Establishment Clause claims based upon effect or entanglement. Accordingly, *Crawford-El* provides no basis for reevaluation of the Tenth Circuit's decision.

CONCLUSION

For the foregoing reasons, Bauchman's petition for writ of certiorari should be DENIED.

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